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96 Fed.Appx. 661
96 Fed.Appx. 661, 2004 WL 1080214 (C.A.10 (Colo.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 96 Fed.Appx. 661, 2004 WL 1080214 (C.A.10 (Colo.)))

United States Court of Appeals,
Tenth Circuit.
Timothy CHANDLER, Petitioner-Appellant,
v.
Sam PRATT, Warden, Respondent-Appellee.
No. 03-1286.

May 14, 2004.

Timothy Chandler, # 30424-013, Littleton, CO, pro se.

John W. Suthers, U.S. Attorney, Office of the United States Attorney, Denver, CO, for Respondent-Appellee.

Before BRISCOE and McKAY, Circuit Judges, and BRORBY, Senior Circuit Judge.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

BRORBY, Senior Circuit Judge.

****1** After examining **petitioner's** brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See*Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

While a **pretrial detainee** at the **Federal Detention** Center in Englewood, Colorado, ***662** petitioner filed a pro se **habeas petition** under **28** U.S.C. § **2241** claiming his Fifth Amendment rights were being violated because 1) he had been detained for over twenty-three months without a trial date having been set and 2) the superceding indictment was signed by David R. Haus as foreperson of the grand jury, but an independent investigation revealed no record of anyone by that name living in the state of Colorado. The district court dismissed the **petition** without prejudice for failure to exhaust available remedies.

The court noted that if petitioner desired to **challenge** his **pretrial detention**, he should do so by filing a motion in his **criminal** case under 18 U.S.C. § 3145, and that if he wanted to **challenge** a violation of his speedy trial rights, he should do so by filing a motion in his **criminal** case under 18 U.S.C. § 3162(a)(2). The court further noted that **petitioner's** counsel had, in fact, filed a motion in the **criminal** case **challenging petitioner's pretrial detention** and the alleged violation of his speedy trial rights, and the motion was still **pending**. The district court docket sheet for the **criminal** action also shows that **petitioner's** counsel had filed a motion seeking dismissal of the superceding indictment due to alleged grand jury abuse. This motion also was still **pending** when the district court here entered its order.

Petitioner now appeals [FN1] and seeks leave to proceed on appeal *in forma pauperis*. The district court denied **petitioner's** request to proceed on appeal *in forma pauperis* because it determined that this appeal was frivolous. We agree.

> FN1. Because petitioner is a **federal** prisoner seeking relief under **28** U.S.C. § **2241**, he does not have to obtain a certificate of appealability before he can pursue an appeal. *Hunnicutt v. Hawk*, 229 F.3d 997, 998 (10th Cir.2000) (per curiam).

To be eligible for **habeas** corpus relief under § **2241**, a **federal pretrial detainee** usually must exhaust other available remedies. *Cf. Fassler v. United States*, 858 F.2d 1016, 1018-19 (5th Cir.1988) (per curiam) (holding defendants cannot use § **2241** to **challenge pretrial detention** orders that can be **challenged** under 18 U.S.C. § 3145); *United States v. Pipito*, 861 F.2d 1006, 1009 (7th Cir.1987) (same). Here, all the claims petitioner attempted to raise in his § **2241 petition** should have been, and apparently were being, pursued in the **criminal** action. To allow petitioner to bring the same claims before another judge in a collateral **proceeding** would not only waste judicial resources, but would encourage judge shopping. The district court properly dismissed **petitioner's** claims without prejudice for failure to exhaust, and there was no arguable basis in law or fact for appealing that decision.[FN2]

> FN2. In addition to the appeal being frivolous when filed, we note that petitioner has since entered into a plea agreement pursuant to which he has waived indictment and has pled guilty to a new one-count information. He is scheduled to be sentenced on May 11, 2004. Thus, it appears that all the claims he raised in his § **2241 petition** either are moot or have been waived.

We therefore DENY **petitioner's** request to proceed *in forma pauperis* on appeal, and we DISMISS the appeal as frivolous.

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97 Fed.Appx. 246
97 Fed.Appx. 246, 2004 WL 740036 (C.A.10 (Colo.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 97 Fed.Appx. 246, 2004 WL 740036 (C.A.10 (Colo.)))

United States Court of Appeals,
Tenth Circuit.
Zebedee E. HALL, Petitioner-Appellant,
v.
Sam PRATT, Warden; Leslie Jones, Jailer, Respondents-Appellees.
No. 03-1387.

April 7, 2004.

Background: Pretrial detainee petitioned for writ of habeas corpus claiming violation of speedy trial rights and forged indictment before he was convicted. The United States District Court for the District of Colorado denied relief. Detainee appealed.

Holding: The Court of Appeals, McConnell, Circuit Judge, held that failure to pursue and exhaust the available remedies in the trial court precluded habeas relief.
Affirmed.

West Headnotes

Habeas Corpus 197 ⚿335

197 Habeas Corpus
197I In General
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Habeas Corpus 197 ⚿336

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)2 Particular Errors and Proceedings
197k332 Criminal Prosecutions
197k336 k. Indictment and Plea. Most Cited Cases
A pretrial detainee's failure to pursue and exhaust the available remedies in the trial court for alleged violation of speedy trial rights and allegedly forged indictment precluded habeas relief; the detainee had remedies in the criminal proceeding, but failed to file any motions or challenge to pretrial confinement or the indictment. 18 U.S.C.A. § 3162(a)(2); 28 U.S.C.A. § 2241.
***247** Zebedee E. Hall, Littleton, CO, pro se.

Before TACHA, Chief Circuit Judge, McKAY and McCONNELL, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

McCONNELL, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See*Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is there-

fore ordered submitted without oral argument.

This is an appeal from the denial of a petition for habeas corpus relief pursuant to 28 U.S.C. § 2241. Zebedee Hall filed the petition as a federal pretrial detainee alleging violation of the Speedy Trial Act, his Sixth Amendment right to a speedy trial, and his Fifth Amendment due process rights. Because the record in this case is lacking, we take judicial notice of the docket in Mr. Hall's criminal case, *United States v. Small,* No. 01-CR-214-7 (D. Colo. filed June 7, 2001). Though he originally sought pretrial release, trial within 30 days, and/or dismissal of his indictment, Mr. Hall has since been tried and convicted, *see* Docket Entry Nos. 1595, 2504, 2674, 2842,*Small* (No. 01-CR-214-7), and on appeal seeks only dismissal of his indictment.[FN1] Because we agree with the district court that Mr. Hall failed to exhaust his other remedies, we affirm its denial of Mr. Hall's petition. Though the government filed no brief in this appeal, this Court may raise the issue of exhaustion sua sponte. *See Steele v. Young,* 11 F.3d 1518, 1523 n. 10 (10th Cir.1993); *cf. Gonzales v. McKune,* 279 F.3d 922, 926 (10th Cir.2002) (en banc) (describing sua sponte consideration of exhaustion as unusual but not impossible).

> FN1. Mr. Hall correctly omitted requests for pretrial release and trial within 30 days from his appeal as his trial and conviction render these requests moot. *See, e.g., Fassler v. United States,* 858 F.2d 1016, 1018 (5th Cir.1988).

To be eligible for habeas corpus relief under § 2241, a federal pretrial detainee generally must exhaust other available remedies. *See Fassler v. United States,* 858 F.2d 1016, 1018 (5th Cir.1988); *United States v. Pipito,* 861 F.2d 1006, 1009 (7th Cir.1987); *Moore v. United States,* 875 F.Supp. 620, 623 (D.Neb.1994). The reasons for this requirement are rooted not in comity (as is the case with state prisoners), but in concerns for judicial economy. Allowing federal prisoners to bring claims in habeas proceedings that they have not yet, but still could, bring in the trial court, would result in needless duplication of judicial***248** work and would encourage "judge shopping." Mr. Hall's petition presents precisely these dangers, as the trial court had no opportunity to rule on the issues Mr. Hall raises.

Mr. Hall brings his petition on essentially three grounds: First, that the length of his pretrial detention amounted to a violation of the Speedy Trial Act; second, that his detention violated his Fifth and Sixth Amendment rights to a speedy trial; and third, that the indictment pursuant to which he was being held was forged, in violation of his Fifth Amendment due process rights.[FN2] At the time the district court ruled on Mr. Hall's petition, Mr. Hall was still free to bring each of these issues before the trial court.[FN3] The district court therefore properly found that he had failed to exhaust his available remedies.

> FN2. Specifically, Mr. Hall reasons: (1) that David R. Haus was the "alleged" foreperson of the grand jury, (2) that because a Motor Vehicle Department search for David R. Haus returned no record, Mr. Haus does not exist, and therefore (3) his indictment must have been forged. *See* Pet. Br. & Ex. B.
>
> FN3. We do not reach the question of whether Mr. Hall's failure to exhaust only one of his claims would still require dismissal of his petition under *Rose v. Lundy,* 455 U.S. 509, 510, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (generally requiring dismissal of "mixed" petitions containing both exhausted and unexhausted claims), because he has failed to exhaust any of his three claims.

****2** First, Mr. Hall failed to file a motion in the trial court, pursuant to 18 U.S.C. § 3162(a)(2), alleging violation of the Speedy Trial Act. He could have done so up until his trial, 18 U.S.C. § 3162(a)(2), and so the district court correctly determined that

he failed to exhaust his available remedies on this ground.

Second, in the criminal proceeding Mr. Hall failed to challenge his pretrial confinement as violating his Fifth and Sixth Amendment rights, though he was free to do so. Mr. Hall once attempted to file such a motion, but it was stricken because he filed the motion pro se while he was being represented by counsel. *See* Docket Entry Nos.1933, 1950,*Small* (No. 01-CR-214-7). Mr. Hall never re-filed the motion, though he did re-file other motions that were stricken at the same time. *See* Docket Entry Nos.1935 (motion), 1950 (stricken), 2081 (refiled), *Small* (No. 01-CR-214-7). Mr. Hall could have raised these issues as a defense at any point up to, and including, at trial. *See, e.g., Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 488-89 & n. 4, 93 S.Ct. 1123, 35 L.Ed.2d 443. (1973).

Third, though Mr. Hall challenged the sufficiency of his indictment on a variety of grounds, *see, e.g.,* Docket Entry No.2081, *Small* (No. 01-CR-214-7) ("Motion to dismiss indictment against defendant(s) Zebedee Hall based on failure of U.S. Atty to take and file required oath of office"), it does not appear from the record or the docket (and Mr. Hall provides no reason for believing) that he ever challenged the sufficiency of his indictment on the basis that it was forged. In sum, the district court correctly determined that Mr. Hall's failure to pursue and exhaust the available remedies in the trial court precluded granting habeas relief under § 2241.

The judgment of the district court is therefore AFFIRMED. The motion to proceed *in forma pauperis* is DENIED.

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Oklahoma.
Jerry Allen CLARK, Petitioner,
v.
Sara M. REVEL, Respondent.
No. CIV-09-228-M.

March 19, 2009.
Jerry Allen Clark, Butner, NC, pro se.

ORDER
VICKI MILES-LaGRANGE, Chief Judge.

***1** On March 4, 2009, United States Magistrate Judge Gary M. Purcell issued a Report and Recommendation in this action brought pursuant to 28 U.S.C. § 2241 challenging the federal criminal proceeding that is pending in this Court. The Magistrate Judge recommended that the Petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2241 be dismissed without prejudice upon refiling. Alternatively, the Magistrate Judge recommended that Petitioner's habeas Petition be dismissed without prejudice due to his failure to exhaust remedies available to him under federal law. Petitioner was advised of his right to object to the Report and Recommendation by March 24, 2009. On March 16, 2009, Petitioner filed his objection on the basis that his person is pending transportation to the Western District of Oklahoma, and, with respect to the exhaustion of remedies, that certain records were not considered when the Magistrate Judge made his decision.

Upon *de novo* review, the Court:
(1) OVERRULES Petitioner's objections to the Report and Recommendation;
(2) ADOPTS the well-reasoned Report and Recommendation issued by the Magistrate Judge on March 4, 2009;
(3) DISMISSES the Petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2241 without prejudice upon refiling.

IT IS SO ORDERED.

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND REPORT AND RECOMMENDATION
GARY M. PURCELL, United States Magistrate Judge.

Petitioner, a litigant appearing *pro se,* has filed a motion to proceed *in forma pauperis* and supporting affidavit in conformity with 28 U.S.C. § 1915. Having reviewed the motion, the Court finds Petitioner is entitled to proceed without prepayment of the filing fee in this 28 U.S.C. § 2241 habeas proceeding, and his motion is GRANTED.

Taking judicial notice of the Court's own records, Petitioner and two co-defendants were indicted in this Court on multiple charges in *United States v. Turner, et al.,* CR-07-213-HE. An arrest warrant was issued for Petitioner's arrest on August 22, 2007. Subsequently, Petitioner was arrested and detained, and the Court appointed counsel to represent Petitioner. On September 20, 2007, the Court granted Petitioner's motion (through his defense counsel) for a psychiatric examination pursuant to 18 U.S.C. § 4241(a). Following a competency hearing conducted January 24, 2008, United States District Judge Joe Heaton entered an order of commitment on January 28, 2008, in which the Court found Petitioner was incompetent to properly assist in his defense and committed Petitioner to the custody of the Attorney General for hospitalization for treatment to determine whether a substantial probability existed that he could attain the capacity to permit the proceedings to go forward pursuant to 18 U.S.C. § 4241(d). On February 26, 2008, Petitioner was admitted to the Mental Health Division of the Federal Medical Center in Butner, North Carolina, to undergo a mental health evaluation. Following this evaluation, a second competency hearing was conducted on September 10, 2008, at which testi-

mony was taken and arguments were made by counsel. On September 12, 2008, District Judge Heaton entered an order committing Petitioner to the custody of the Attorney General for hospitalization and treatment. Judge Heaton also found that Petitioner required an involuntary medication treatment plan for the purpose of restoring his competency to stand trial. Petitioner's commitment under this order is still in effect. Petitioner filed a *pro se* notice of appeal of this commitment order.

***2** Petitioner has now filed the instant Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Petitioner alleges in his Petition that the indictment filed against him in Case No. CR-07-213-HE is defective, his right to a speedy trial has been denied in the pending criminal proceeding, his defense attorneys have not filed certain pretrial motions, and the competency proceedings and commitment orders entered in the pending criminal proceeding violate his constitutional rights. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), and a preliminary review of the sufficiency of the Petition has been undertaken. 28 U.S.C. § 2243. For the following reasons, it is recommended that the Petition be DISMISSED without prejudice upon filing. [FN1]

> FN1. The Court need not seek a response from the Respondent in this instance where it is clear from the face of the Petition that Petitioner is not entitled to relief. 28 U.S.C. § 2243.

All of Petitioner's allegations seeking § 2241 habeas relief are directed toward the federal criminal proceeding that is pending in this Court. Petitioner is not, however, in custody within the jurisdictional confines of this Court. Therefore, this Court lacks a jurisdictional basis for reviewing the Petition. *See Howard v. United States Bureau of Prisons,* 487 F.3d 808, 811 (10th Cir.2007)(explaining that § 2241 petition is filed in district where petitioner is confined).

Moreover, even if jurisdiction is properly exercised in this Court, Petitioner has not shown that he has exhausted available remedies. In *Chandler v. Pratt,* 96 Fed. Appx. 661, 2004 WL 1080214 (10th Cir. May 14, 2004)(unpublished op.), the Tenth Circuit Court of Appeals upheld the dismissal without prejudice of similar claims brought by a federal pretrial detainee in a 28 U.S.C. § 2241 habeas petition. The petitioner in that case contended that he was being denied his right to a speedy trial and that the superceding indictment filed against him in a pending federal criminal proceeding was defective. In the *Chandler* decision, the court stated that

> [t]o be eligible for habeas corpus relief under § 2241, a federal pretrial detainee usually must exhaust other available remedies.... Here, all the claims petitioner attempted to raise in his § 2241 petition should have been, and apparently were being, pursued in the criminal action. To allow petitioner to bring the same claims before another judge in a collateral proceeding would not only waste judicial resources, but would encourage judge shopping. The district court properly dismissed petitioner's claims without prejudice for failure to exhaust, and there was no arguable basis in law or fact for appealing that decision.

Id. at 662 (citations omitted). Petitioner has not shown that he has exhausted remedies available to him under federal law, *see, e.g.,* 18 U.S.C. § 3162(a)(2)(challenge under speedy trial guarantees), with respect to each of his habeas claims. Petitioner has court-appointed counsel in his criminal proceeding, and he has filed numerous *pro se* motions in the proceeding as well, including an appeal of District Judge Heaton's September 12, 2008 order of commitment and for involuntary medication management that has been docketed in the Tenth Circuit Court of Appeals. *United States v. Clark,* Tenth Circuit Court of Appeals No. 08-6198. [FN2] Petitioner's challenges to the federal criminal proceeding can and should be brought in the criminal matter, in an appeal to the Tenth Circuit Court of Appeals of pretrial decisions as allowed under federal law, or, should he be convicted, in an appeal following conviction. Thus, Petitioner's habeas Pe-

tition should be dismissed without prejudice due to his failure to exhaust available remedies. *See United States v. Addonizio,* 442 U.S. 178, 184 n. 10 (1979)(" 'the writ of habeas corpus should not do service for an appeal.... This rule must be strictly observed if orderly appellate procedure is to be maintained' ")(quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 274 (1942)); *Jones v.. Perkins,* 245 U.S. 390, 391-392 (1918)("It is well settled that in the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and habeas corpus should not be granted in advance of a trial."); *Horning v. Seifart,* 107 F.3d 11 (table), 1997 WL 58620 (6th Cir. Feb. 11, 1997) (unpublished op.)("habeas petition was properly dismissed as that remedy cannot be invoked to raise defenses to a pending federal criminal prosecution").

> FN2. A review of the Pacer Service Center's U.S. Party/Case Index reveals that Petitioner has previously raised a due process challenge to the involuntary commitment orders entered by Judge Heaton in a 28 U.S.C. § 2241 petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of North Carolina. *See Clark v. United States,* No. 5:08-HC-2045-D (E.D.N.C.). In that case, United States District Judge James C. Dever III entered an order on October 17, 2008, finding that the statutory requirements under 18 U.S.C. § 4241 had been satisfied, as reflected in the docket sheet in the pending federal criminal case, and that Petitioner's involuntary commitment under § 4241 does not violate due process.

RECOMMENDATION

***3** Based on the foregoing findings, it is recommended that the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 be DISMISSED without prejudice upon filing. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by *March 24th,* 2009, in accordance with 28 U.S.C. § 636 and LCvR 72.1. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. *Moore v. United States of America,* 950 F.2d 656 (10th Cir.1991); *cf. Marshall v. Chater,* 75 F.3d 1421, 1426 (10th Cir.1996)("Issues raised for the first time in objections to the magistrate judge's recommendations are deemed waived.").

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

Slip Copy, 2009 WL 763487 (W.D.Okla.)

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